U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street - Suite 900
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue date: 24May2001

Case No: 2000-BLA-0713

In the Matter of

CARL H. HOPPER

Claimant,

v.

GREAT WESTERN COAL, INC.,
D/B/A CROCKET COLLIERIES,

Employer,

and

GREAT WESTERN RESOURCES,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

Ron Carson, Lay Representative
For the claimant

Denise M. Davidson, Esquire
For the employer

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq*. (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover bene-

fits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201 (1996).

Following proper notice to all parties, a formal hearing was held in regard to this claim on October 19, 2000 at Pineville, Kentucky. The Director's exhibits were offered in evidence at the hearing pursuant to 20 C.F.R. § 725.456, and the parties were afforded the opportunity to present additional evidence. The parties also were allowed to submit closing arguments.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively.

ISSUES

The following controverted issues remain for decision:

1. whether the claimant, Carl Hopper, has pneumoconiosis as defined by the Act and regulations;

2. whether his pneumoconiosis arose out of coal mine employment;

3. whether the claimant is totally disabled; and,

4. whether his total disability is due to pneumoconiosis.

(DX 31; Tr. 7)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The claimant, Carl Hopper, was born July 5, 1934. (DX 1; Tr. 8). The last grade level he completed was the eighth grade. (DX 29, p. 4; Tr. 8). He married Kathryne Grant on July 5, 1955, and she is his only dependent for purposes of augmentation of benefits. (DX 1; DX 30, p. 54).

Mr. Hopper has had breathing problems since 1989 and was first treated by Dr. Patel for his breathing problems in 1990. (Tr. 10). He has since been treated by several additional doctors for his breathing problems and is currently taking breathing medication and using a breathing machine. (Tr. 11). He testified that he has an enlarged heart and congestive heart failure. (Tr. 12). He stated that he has smoked eight to ten cigarettes per day since he was ten or eleven years old. (DX 29, p. 9-10; Tr. 13).

The employer conceded 16 years of coal mine employment by Mr. Hopper and I accept the stipulation since it is supported by the evidence. (Tr. 6-7; DX 1-4). I also accept the employer's concession that it is the correctly designated responsible operator for purposes of Mr. Hopper's claim as this stipulation also is supported by the evidence and the pertinent provisions of the Act. (DX 2-4, 30). 20 C.F.R. §§ 725.492 and 725.493. Mr. Hopper's last job was as a belt man, supply man and ventilation man. (Tr. 8). All of his employment was in underground mines. (Tr. 8). He would take supplies, then work on the beltline, shoveling and cleaning up. (Tr. 8). His work required heavy lifting, as much as a hundred pounds of rock dust, cement bags and timbers. (Tr. 9). His job also required him to clean up any coal or rock dust that would spill off the belt drive and shovel the coal back up on the belt. (Tr. 9).

In 1991, Mr. Hopper stopped working in the mines due to an injury to his right knee and his breathing problems. (Tr. 10). He has not worked since 1991. (DX 29, p. 5; Tr. 13).

Mr. Hopper filed his first claim for black lung benefits on September 17, 1991. (DX 30). The claim was denied by a claims examiner on March 13, 1992. (DX 30). Since the claimant did not appeal the finding, the claim was deemed abandoned.

The claimant filed the claim in this proceeding on July 14, 1999. (DX 1). A claims examiner with the U.S. Department of Labor, Office of Workers' Compensation Programs made an initial determination awarding benefits to the claimant on November 4, 1999. (DX 16). The employer appealed this finding on November 11, 1999. (DX 17). On March 2, 2000, the district director found Mr. Hopper was entitled to black lung

benefits. (DX 22). The employer appealed this finding and requested a hearing on March 30, 2000. The claim was referred to this office for hearing. (DX 31).

Pneumoconiosis and Related Issues

I. *Medical Evidence*

The medical evidence of record is as follows:

A. **X-rays**

DATE OF X-RAY (REREADING)	EXHIBIT NO.	PHYSICIAN/ QUALIFICATIONS	READING
10/18/91	DX 30	G. Baker/B-reader	1/0; q/r; 5 zones
10/18/91 (11/1/91)	DX 30	N. Sargent/Board certified radiologist and B-reader[1]	Negative
10/18/91 (11/25/91)	DX 30	S. Paranthaman/B-reader	Some pleural abnormalities consistent with pneumoconiosis
11/14/91	DX 30	A. Dahhan	Negative
8/4/92 (8/5/92)	EX 4	E. Lane/B-reader	0/0

[1] When evaluating interpretations of miners' chest x-rays, the administrative law judge may assign greater evidentiary weight to readings of physicians with greater qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The Benefits Review Board and the Sixth Circuit Court of Appeals have approved attributing more weight to interpretations of B-readers because of their expertise in this area. *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984); *Warmus v. Pittsburgh & Midway Coal Mining Co.*, 839 F.3d 257, 261, n.4 (6th Cir. 1988). A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). The Benefits Review Board has also ruled that an x-ray interpretation by a physician with dual qualifications of a B-reader and certification by the American Board of Radiology may be given greater evidentiary weight than an interpretation by any other reader. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

8/2/99	DX 6	G. Baker/B-reader	1/0; p/s; 5 zones
8/2/99 (8/20/99)	DX 7	N. Sargent/Board certified radiologist and B-reader	Negative
8/2/99 (2/16/00)	DX 28	H. Spitz/Board certified radiologist and B-reader	Completely negative
DATE OF X-RAY (REREADING)	EXHIBIT NO.	PHYSICIAN/ QUALIFICATIONS	READING
8/2/99 (9/14/99)	DX 8	P. Barrett/Board certified radiologist and B-reader	Negative
8/2/99 (1/10/00)	DX 27	J. Wiot/Board certified radiologist and B-reader	Negative
10/4/99 (10/11/99)	CX 3	M. Alexander/Board certified radiologist and B-reader	2/1; p/p; 5 zones
2/7/00	DX 23	B. Broudy/B-reader	Negative
2/7/00 (2/9/00)	EX 3	G. Ellis/Board certified radiologist	Normal frontal chest

B. ***Pulmonary Function Studies***

DATE	EXHIBIT	HEIGHT	AGE	FVC	FEV1	MVV	TRACINGS	EFFORT
10/18/91	DX 30	69.75"	57	4.05	2.48	81	Yes	Fair
11/14/91	DX 30	70.5"	57	3.06	1.62	64.8	Yes	Good
				(Pre-bronchodilator results)				
				3.61	1.83	73.2		
				(Post-bronchodilator results)				
8/4/92	EX 4	70.75"	58	3.22	2.06	–-	No	Good
8/2/99	DX 6	70"	65	3.13	1.84	65	Yes	Good
[Validation: Found acceptable by Dr. Burki on 9/11/99. (DX 6).]								
2/7/00	DX 24	70"	65	2.94	3.59	46	Yes	Good
				(Pre-bronchodilator results)				
				3.29	1.66	60		
				(Post-bronchodilator results)				
[Validation: Found unacceptable by Dr. Burki on 3/14/00. (DX 24).]								
5/25/00	CX 1	71"	65	2.88	1.72	—-	Yes	Good

C. ***Blood Gas Studies***

DATE	EXHIBIT	pCO2	PO2	At Rest or after Exercise
10/18/91	DX 30, p. 32	40.8	81.7	At Rest

11/14/91	DX 30, p. 27	40.1	57.9	At Rest
		35.3	74.1	After Exercise
8/4/92	EX 4	40.7	66.0	At Rest

DATE	EXHIBIT	pCO2	PO2	At Rest or after Exercise
8/2/99	DX 6	46.4	69.9	At Rest
2/7/00	DX 23	45.0	69.8	At Rest

D. ***Medical Reports***

Dr. Glenn Baker examined Mr. Hopper on October 18, 1991 and again on August 2, 1999. (DX 30; DX 6). During both examinations, he considered 16 years of coal mine employment, lastly as a ventilation man and beltman, a medical history, and symptoms, including wheezing, dyspnea, cough with sputum, chest pain and ankle edema. He also considered a history of smoking one-half pack of cigarettes per day since approximately 1945. He conducted a physical examination, a chest x-ray, a pulmonary function study, and a blood gas study. Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure. He further diagnosed chronic obstructive pulmonary disease, chronic bronchitis, hypoxemia and arteriosclerotic heart disease, all of which, except the arteriosclerotic heart disease, he attributed to coal dust exposure and cigarette smoking. In 1991, Dr. Baker opined that the miner had mild to moderate impairment. In 1999, he found the miner had moderate impairment due to cigarette smoking and coal dust exposure and concluded that Mr. Hopper does not have the respiratory capacity to perform the work of a coal miner.

Dr. Abdulkadar Dahhan examined the miner on November 14, 1991. (DX 30, p. 14). He considered 16 years of underground coal mine employment, lastly operating a belt-line and as a brattice man. He also noted the miner had smoked one-third to one-half pack of cigarettes per day since age 10. Based on a medical history, symptoms, including productive cough with yellow sputum, dull chest pain and trouble sleeping, and the results of a chest x-ray, a pulmonary function study, and a blood gas study, Dr. Dahhan found insufficient objective evidence for a diagnosis of occupational pneumoconiosis. He diagnosed chronic obstructive lung disease which he felt could be accounted for by Mr. Hopper's smoking history and obesity. Dr. Dahhan found no evidence of pulmonary impairment and/or disability arising from his coal dust exposure. In his opinion, the claimant's respiratory reserve is not adequate to allow him to be able to return to his previous coal mining

employment due to his obstructive lung disease and obesity, conditions which affect the general public at large and are not caused by or related to the inhalation of coal dust. Dr. Dahhan is board-certified in internal medicine and pulmonary diseases.

Dr. Emery Lane, who is board-certified in internal medicine, examined Mr. Hopper on August 4, 1992. (EX 4). He conducted a physical examination, as well as a chest x-ray, an EKG, a pulmonary function study, and a blood gas study. Dr. Lane considered the miner's complaints of shortness of breath, some wheezing, a productive cough which is worse at night, and some edema. He also took into account a history of smoking one-half pack of cigarettes per day for 46 years and approximately 16 years of coal mine employment, lastly as in brattice work and mine helper. Dr. Lane diagnosed chronic obstructive pulmonary disease but found no evidence of coal workers' pneumoconiosis. In his opinion, the miner does not have an occupational lung disease caused by his coal mine employment. Dr. Lane concluded that the miner is not physically able to perform his last coal mine employment from a pulmonary standpoint due to his chronic obstructive pulmonary disease.

The record contains an incomplete record of a hospital admission to Fort Sanders Regional Medical Center on February 20, 1996. (DX 9). The miner was admitted for an evaluation of heart failure, dyspnea and chest pain. Dr. Victor Salter attended Mr. Hopper. He noted a medical history of hypertension and a cigarette smoking history of more than 50 years. No medical opinion or diagnosis is present in the hospital record.

Dr. Bruce Broudy, who is board-certified in internal medicine and pulmonary disease, examined the miner on February 7, 2000. (DX 23). He noted 16 years of coal mine employment, lastly as a beltman and ventilation man, a medical history, and symptoms, including shortness of breath, cough with sputum and swelling in his feet and legs. Dr. Broudy considered a smoking history of one-half package of cigarettes per day for 46 years before quitting in 1997, and the results of a physical examination, a chest x-ray, a pulmonary function study and blood gas study. He diagnosed moderately severe to severe chronic obstructive airways disease due to cigarette smoking and massive obesity. He does not believe that the miner has coal workers' pneumoconiosis and found no significant pulmonary disease or respiratory impairment which has arisen from his coal mining work. In his opinion, the claimant is not able to return to his last coal mining job.

Dr. Broudy was later deposed on June 22, 2000. (EX 1). He recited his medical credentials and summarized the findings

of his examination on February 7, 2000. He also reviewed the pulmonary function studies administered by Dr. Baker on August 2, 1999 and concluded that the results were similar to what he had obtained. Thus, he found there was not any significant change over that interval of time. Dr. Broudy reaffirmed his February 7, 2000 findings and testified that the miner does not have coal workers' pneumoconiosis and he has no respiratory impairment which has arisen from his occupation as a coal worker.

II. ***Discussion***

In order to be entitled to benefits, the claimant must establish that he has pneumoconiosis, that he is totally disabled as a result of that disease and that the pneumoconiosis arose out of coal mine employment. Mr. Hopper filed the claim on which this appeal is based on July 14, 1999. (DX 1). The claim must, therefore, be considered under the amendments to Part 718 of the regulations, which are effective for claims filed after March 31, 1980.

Section 718.202 provides the methods by which a claimant may establish the existence of pneumoconiosis under this part of the regulations. Under Section 718.202(a)(1), a chest x-ray conducted and classified in accordance with Section 718.102 may form the basis for a finding of the existence of pneumoconiosis.

The record contains 13 readings of six x-rays. The first x-ray, taken October 18, 1991, was found positive (category 1/0) by Dr. Baker and Dr. Paranthaman, both of whom are B-readers. Dr. Sargent, however, who is both a B-reader and a board-certified radiologist, reread the film as negative. I defer to his superior credentials and find this film does not prove pneumoconiosis. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

The November 14, 1991 x-ray was found negative by Dr. Dahhan and was not reread. The August 4, 1992 x-ray was found negative by Dr. Lane, a B-reader, and was not reread.

The August 2, 1999 x-ray was found positive (category 1/0) by Dr. Baker, a B-reader, but was reread as negative by Drs. Sargent, Spitz, Barrett, and Wiot, all of whom are both B-readers and board-certified radiologists. Because of their superior qualifications, I find this x-ray does not prove Mr. Hopper has pneumoconiosis.

The October 4, 1999 x-ray was found positive (category 2/1) by Dr. Alexander, a dually certified reader, and was not reread. Dr. Alexander also found mild cardiomegaly, pleural

thickening, and calcified hilar and mediastinal lymph nodes and small calcified pulmonary nodules consistent with a healed granulomatous disease.

Dr. Broudy, a B-reader, found the February 7, 2000 x-ray negative for pneumoconiosis, noting scattered calcifications bilaterally. Dr. Ellis, a board-certified radiologist, felt this film showed a normal frontal chest.

In summary, there are four positive readings and nine negative readings. Of the dually-certified readers, one found an x-ray positive, while five found the x-rays they read as negative. The first three positive readings were reinterpreted by at least one better-qualified reader as negative. Only the October 4, 1999 positive x-ray reading by Dr. Alexander was not reread. However, the most recent x-ray was found negative for the disease by one B-reader and one board-certified radiologist. Consequently, based on readings of the most recent x-ray and the conclusion of a majority of the dually certified readers, I find that the claimant has failed to establish, by a preponderance of the evidence, the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

A biopsy conducted and reported in compliance with Section 718.106 may also be the basis for a finding of the existence of pneumoconiosis. 20 C.F.R. § 718.202(a)(2). However, in this case, there is no biopsy or autopsy evidence in the record to consider.

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305 or 718.306 are applicable. Since there is no x-ray evidence of complicated pneumoconiosis in the record, Section 718.304 does not apply. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant since it is to be used in connection with the claim of deceased miners.

Section 718.202(a)(4) provides that a determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis. Any such finding shall be based on objective medical evidence, and shall be supported by a reasoned medical opinion.

Dr. Baker diagnosed pneumoconiosis, while Drs. Dahhan, Lane, and Broudy did not. Dr. Salter, who attended Mr. Hopper at the Fort Sanders Regional Medical Center, did not address the possibility of the disease.

I place some weight on Dr. Baker's opinion because he examined Mr. Hooper twice, allowing him an eight-year span in which to compare the miner's condition. His opinion is well documented. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Because of his status as a board-certified internist and pulmonary specialist, I find that his opinion merits greater weight. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The only factor detracting from his opinion is the fact the x-rays he read as positive were reread as negative by at least one dually-certified interpreter.

I place great weight on the opinions of Drs. Dahhan and Broudy because of their qualifications. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). Dr. Lane is board-certified in internal medicine, thus entitling his opinion to some added weight. The reports of all three physicians are well documented and reasoned. *Perry*, 9 BLR 1-1. Their findings are supported by the overall x-ray evidence, including the readings of B-readers who are also board-certified radiologists. For these reasons, I find the opinions of Drs. Dahhan, Lane, and Broudy more persuasive. Consequently, I find that the medical opinion evidence does not tend to establish the existence of pneumoconiosis under Section 718.202(a)(4).

In considering all the evidence bearing on the existence of pneumoconiosis, I find that despite the four positive x-ray reports and Dr. Baker's medical opinion to the contrary, the claimant has not established the existence of pneumoconiosis under Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25 (3rd Cir. 1997).

It must also be determined whether the pneumoconiosis which Mr. Hopper suffers was caused at least in part by his coal mine employment. In this case, however, that relationship may be presumed because it has been established that the claimant worked at least ten years as a coal miner. 20 C.F.R. § 718.203(b). Moreover, the weight of the medical evidence fails to establish any cause for the miner's pneumoconiosis other than coal mine employment. Thus, the presumption is not rebutted.

After the claimant has established pneumoconiosis arising from coal mine employment, he must still establish that he has been totally disabled by the disease. A claimant is considered totally disabled when he is no longer able to perform his usual coal mine work. 20 C.F.R. § 718.204(b)(2). Section 718.204 provides several criteria for determining that a claimant is totally disabled.

Subsection (c)(1) of Section 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV_1 values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC values or MVV values equal to or less than the applicable table values. Alternatively, a qualifying FEV_1 reading together with an FEV_1/FVC ratio of 55% or less may be sufficient to prove a totally disabling respiratory impairment under this subsection of the regulations.

The record contains six pulmonary function studies, and three yielded qualifying[2] values. The November 14, 1991 study produced qualifying values both before and after the administration of a bronchodilator. The August 2, 1999 study yielded qualifying values and was found acceptable by a reviewing physician, Dr. Burki, who is a board-certified internist. The February 7, 2000 study produced qualifying values post-bronchodilator only and was found unacceptable by Dr. Burki. The most recent study, administered May 25, 2000, did not yield qualifying values. Thus, there are two qualifying studies which were either validated or not reviewed. They occurred on November 14, 1991 and August 2, 1999. An intervening study in 1992 did not produce qualifying values, and the most recent study, conducted nine months after the August 1999 test, yielded normal results. Based on the preponderance of evidence and the most recent study, I find that the claimant has failed to establish total disability pursuant to Section 718.204(c)(1).

Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO_2 to pO_2, which indicates the presence of a totally disabling impairment in the transfer of oxygen from the claimant's lung alveoli to his blood. 20 C.F.R. § 718.204(c)(2) and Appendix C. There are five blood gas studies of record. Only the at-rest study of November 14, 1991 produced qualifying values. All subsequent studies, taken in 1992, 1999, and 2000, did not yield qualifying values. As a result, I conclude that Mr. Hopper has not established total disability pursuant to Section 718.204(c)(2).

A miner shall be considered totally disabled under Section 718.204(c)(3) where he suffers from pneumoconiosis and

---

[2] A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.*, Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(c)(1) and (c)(2). A "non-qualifying" test produces results which exceed the requisite table values.

has been shown by medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure. There is no such evidence in this case.

Where total disability cannot be established under subparagraphs (c)(1), (c)(2) or (c)(3), Section 718.204(c)(4) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Drs. Baker, Dahhan, Lane, and Broudy are in agreement that Mr. Hopper is disabled from returning to his last coal mining job. Their opinions, as noted above, are all well reasoned and documented. They are all board-certified physicians, lending credence to their opinions. Dr. Dahhan’s opinion is further supported by the qualifying pulmonary function study and at-rest blood gas study that he administered. Given Mr. Hopper’s age, the heavy exertional requirements of his coal mining job, and his presenting symptoms, I find all the these physicians’ opinions highly probative and persuasive. Thus, I find that the claimant has established total disability pursuant to Section 718.204 (c)(4).

After considering all contrary probative evidence, I find that despite the majority of non-qualifying pulmonary function and blood gas studies, the medical opinion evidence is the most persuasive evidence on this issue. The opinions of Drs. Baker, Dahhan, Lane, and Broudy are supported by the aforementioned reasons. Therefore, I find that the claimant has established total disability pursuant to Section 718.204(c).

The claimant must establish that his disability arose out of coal mine employment. Section 718.204(b) provides that a miner will be considered totally disabled due to pneumoconiosis if the disease is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is considered a “substantially contributing cause” of the disability if it either has a material adverse effect on the miner’s respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment caused by a disease unrelated to coal mine employment. Evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner’s total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability. Total disability due to pneumoconiosis must be

established through a physician's documented and reasoned medical report.

The Sixth Judicial Circuit, under whose jurisdiction this claim arises, requires a finding under Section 718.204(c)(4) that the claimant's total disability is due not just to a respiratory or pulmonary impairment, but to pneumoconiosis. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). In satisfying that standard, the Sixth Circuit has held that a miner need only affirmatively establish that the totally disabling respiratory impairment is due "at least in part" to pneumoconiosis. *Adams v. Director, OWCP* 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Dr. Baker opined that the miner's impairment was due to cigarette smoking and coal dust exposure, which he found resulted in pneumoconiosis. Dr. Dahhan found no impairment from coal dust exposure. He ascribed the miner's disability to chronic obstructive pulmonary disease caused by smoking and obesity. Dr. Lane felt Mr. Hopper was totally disabled by his chronic obstructive pulmonary disease. While he did not provide a cause for the chronic obstructive pulmonary disease, he did opine that Mr. Hopper suffered no occupational lung disease caused by coal dust exposure. This statement effectively eliminates any link between the chronic obstructive pulmonary disease and coal dust exposure or pneumoconiosis. Dr. Broudy opined that the miner suffered no significant pulmonary impairment due to coal mine employment. Like Dr. Dahhan, he felt the claimant's chronic obstructive pulmonary disease was caused by smoking and obesity.

The opinions linking the chronic obstructive pulmonary disease to smoking and obesity are well supported by the record. All of the physicians found Mr. Hopper to be obese, and his 50+ year smoking history is undeniably extensive. On the other hand, I have determined that Mr. Hopper does not suffer from coal workers' pneumoconiosis. Therefore, Dr. Baker's opinion linking total disability to the disease is not well-reasoned. Because I place more weight on the opinions of Drs. Dahhan, Lane, and Broudy, I find that the claimant has failed to establish that his total disability was due at least in part to pneumoconiosis. Therefore, his claim for benefits must be denied[3].

---

[3]I finally note that the district director and the parties did not raise or discuss Section 725.309. Although that section of the regulations usually must be considered on the question of entitlement, I found it to be of little significance to the outcome of this case. Since the weight of the medical evidence proves Mr. Hopper is now totally disabled

Amendments to Part 718

The Part 718 regulations were amended effective January 19, 2001. 65 Fed. Reg. 79,920 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725, 726, 727). However, the United States District Court for the District of Columbia issued a Preliminary Injunction Order in *National Mining Association v. Chao*, No. 1:00CV03086 (DGS) staying all briefing, hearings, and decisions on the merits on all claims for black lung benefits pending before the Office of Administrative Law Judges except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in that lawsuit will not affect the outcome of the pending case. Pursuant to the court's order, I issued an order on February 14, 2001 requiring the parties to submit a brief explaining with specificity whether the application of the amended regulatory provisions at 20 C.F.R. §§ 718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 718.205(c)(5), or 718.205(d) will affect the outcome of this case. I also provided in that order that I would construe the failure of a party to submit a brief as that party's position that the amended regulatory provisions would not affect he outcome of the claim.

The employer filed a brief on February 26, 2001, but no brief was received from either the claimant or the Director. Accordingly, I consider the failure to file a brief on behalf of the claimant and the Director as their positions that the amended regulatory provisions will not impact the outcome of this case.

The employer takes the position that the amendment to Section 718.104(d) regarding the weight to be placed on a treating physician's opinion will not affect the outcome of this case because there are no reports from treating physicians. I agree.

The employer contends, however, that the amendment to Section 718.201(a)(2), creating a condition called "legal pneumoconiosis" can impact the case because several physicians diagnosed chronic obstructive pulmonary disease, which is part of that definition. I disagree because the amendment merely

---

from a respiratory standpoint, this represents a material change in Mr. Hopper's condition since the denial of the claim under Section 725.309. I therefore chose to initially address the merits of the second claim based on the totality of the evidence rather than initially consider only the newly developed evidence under Section 725.309 and the criteria set forth in *Sharondale v. Ross*, 42 F.2d 993 (6th Cir. 1994).

codifies the holdings in such cases as *Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209, 1-1212 (1984), which holds that if a physician relates chronic obstructive pulmonary disease to coal mine dust exposure, it is tantamount to a diagnosis of pneumoconiosis. The amendment simply acknowledges the distinction between legal and medical pneumoconiosis which was already adopted by the circuit courts in construing the statutory definition. *See e.g., Gulf & Western Industries v. Ling*, 176 F.3d 226, 231-32 (4th Cir. 1999).

The employer also believes that the amendment to Section 718.201(c), which recognizes that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure, may prejudice the employer. Again I disagree because no physician of record opined either that Mr. Hopper developed pneumoconiosis only after he ceased coal mine employment or that he could not suffer from the disease because he did not have it when he was so employed.

The employer takes the position that the amendment to Section 718.204(a) could prejudice the employer's position in establishing causation of the miner's disability, but supplies no specific reason other than to conclude that the amended regulations shift the burden of proof and enlarge the standards for which a claimant may establish entitlement under the Act. Section 718.204(a) now provides that any nonpulmonary or nonrespiratory condition that independently causes a disability unrelated to the miner's pulmonary or respiratory disability shall not be considered in the disability causation determination. The regulation also provides that if a nonpulmonary or nonrespiratory condition causes a chronic respiratory or pulmonary impairment, that condition shall be considered in determining whether the miner is totally disabled due to pneumoconiosis. Because there are no medical opinions diagnosing an independently disabling nonpulmonary or nonrespiratory condition, I find that this amended regulation will not affect the outcome of this claim.

Finally, the employer asserts that the amendments to Sections 718.205(c)(5) and 718.205(d) will not affect the outcome of this case because it is not a survivor's claim. I agree. Thus, none of the amendments to the regulations would have any effect on the outcome of this case.

ORDER

The claim of Carl Hopper for benefits under the Act is denied.

A
DONALD W. MOSSER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Workers' Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601. See 20 C.F.R. §§ 725.478 and 725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.